

FINAL REGULATIONS

For information concerning Final Regulations, see Information Page.

Symbol Key

Roman type indicates existing text of regulations. *Italic type* indicates new text. Language which has been stricken indicates text to be deleted. [Bracketed language] indicates a change from the proposed text of the regulation.

TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS

FORENSIC SCIENCE BOARD

REGISTRAR'S NOTICE: Chapter 11 (§ 9.1-1110 et seq.) of Title 9.1 of the Code of Virginia (Chapters 868 and 881 of the 2005 Acts of Assembly) created the Department of Forensic Science, which formerly existed as the Division of Forensic Science within the Department of Criminal Justice Services. The following regulations are amended to change the Virginia Administrative Code numbers to reflect the new agency number for the Department of Forensic Science and to change references from the "Division of Forensic Science" to the "Department of Forensic Science." Under the Department of Forensic Science, 6 VAC 20-190, Regulations for Breath Alcohol Testing, is renumbered 6 VAC 40-20; 6 VAC 20-210, Regulations for the Implementation of the Law Permitting DNA Analysis Upon Arrest for all Violent Felonies and Certain Burglaries, is renumbered 6 VAC 40-40; and 6 VAC 20-220, Regulations for the Approval of Field Tests for Detection of Drugs, is renumbered 6 VAC 40-30.

The Department of Forensic Science is claiming an exclusion from the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The Department of Forensic Science will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **6 VAC 40-20. Regulations for Breath Alcohol Testing (formerly 6 VAC 20-190-10 through 6 VAC 20-190-200) (adding 6 VAC 40-20-10 through 6 VAC 40-20-200).**

Statutory Authority: § 9.1-1110 of the Code of Virginia.

Effective Date: February 22, 2006.

Agency Contact: Katya N. Herndon, Regulatory Coordinator, Department of Forensic Science, 700 North 5th Street, Richmond, VA 23219, telephone (804) 786-6848, FAX (804) 786-6857, or e-mail katya.herndon@dfs.virginia.gov.

Summary:

These regulations describe the process for approval of breath test devices, general methods of conducting breath tests, training and licensing procedures for operators, required forms and records, and the use of preliminary breath test devices. The amendments to the regulation reflect the agency's new status as a department in two ways. First the amendments change the citation for these regulations from 6 VAC 20-190 to 6 VAC 40-20 to reflect the new agency number assigned to the Department of

Forensic Science. Second, the amendments change any reference in the regulations to the agency from the "Division of Forensic Science" to the "Department of Forensic Science."

CHAPTER ~~400~~ 20.

REGULATIONS FOR BREATH ALCOHOL TESTING.

PART I. DEFINITIONS.

~~6 VAC 20-190-10.~~ 6 VAC 40-20-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Agency" means any law-enforcement agency under whose auspices breath tests are performed.

"Blood alcohol concentration" means percent by weight of alcohol in a person's blood based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

"Breath test device" means an instrument designed to perform a quantitative chemical test for alcohol on a sample of breath of a person subject to the provisions of §§ 18.2-268.1 through 18.2-268.3, 18.2-268.9, 29.1-738.2, 46.2-341.26:1 through 46.2-341.26:3 or 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

"Chemical test" or "chemical analysis" means a quantitative test for alcohol using infrared, or fuel cell methodologies or a combination thereof performed on a sample or samples of breath of a person subject to the provisions of §§ 18.2-267, 18.2-268.1 through 18.2-268.3, 18.2-268.9, 29.1-738.1, 29.1-738.2, 46.2-341.25, 46.2-341.26:1 through 46.2-341.26:3 or 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

~~"Division~~ *Department*" means the ~~Division~~ *Department* of Forensic Science.

"Licensee" means a person holding a valid license from the ~~division~~ *department* to perform a breath test of the type set forth within these regulations under the provisions of § 18.2-268.9, § 29.1-738.2 or § 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

"Preliminary breath test device" means an instrument designed to perform a quantitative chemical test for alcohol on a sample of breath of a person suspected of an offense subjecting such person to the provisions of § 18.2-267, 29.1-738.1 or 46.2-341.25 of the Code of Virginia.

"Supplies and accessories" means any item, device, chemical, reagent, tube, mouthpiece, replacement part, or glassware, whether or not reusable, which is used in conjunction with a breath test device to determine the blood

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alcohol concentration of any person subject to the provisions of §§ 18.2-268.1 through 18.2-268.3, 18.2-268.9, 29.1-738.2, 46.2-341.26:1 through 46.2-341.26:3 or 46.2-341.26:9 of the Code of Virginia or a parallel local ordinance.

~~6 VAC 20-190-20.~~ 6 VAC 40-20-20. Substantial compliance.

These regulations and the steps set forth herein relating to the taking, handling, identification and disposition of breath samples, the testing of such samples, and the completion and filing of any form or record prescribed by these regulations are procedural in nature and not substantive. Substantial compliance therewith shall be deemed sufficient.

PART II.

BREATH TESTS UNDER §§ 18.2-268.9, 29.1-738.2, AND 46.2-341.26:9 OF THE CODE OF VIRGINIA.

Article 1.

Breath Test Administrative Procedures.

~~6 VAC 20-190-30.~~ 6 VAC 40-20-30. Breath test devices.

Breath test devices shall be tested for accuracy by the ~~division~~ department at least once every six months. All new breath test devices or those having been repaired by the manufacturer or the manufacturer's authorized repair service shall be tested for accuracy by the ~~division~~ department before their return to service.

~~6 VAC 20-190-40.~~ 6 VAC 40-20-40. Storage.

The breath test device must be stored in a clean, dry location that is only accessible to licensees and to other authorized individuals.

~~6 VAC 20-190-50.~~ 6 VAC 40-20-50. Care.

Proper care shall be taken to ensure that the breath test device is kept free from excessive moisture, heat and dust.

~~6 VAC 20-190-60.~~ 6 VAC 40-20-60. Modifications.

No modifications shall be made to any breath test device by an agency without the written consent of the ~~division~~ department.

~~6 VAC 20-190-70.~~ 6 VAC 40-20-70. Use.

The breath test device shall not be used for administration of tests for alcohol use pursuant to the Federal Omnibus Transportation Employees Testing Act of 1991, 49 CFR Part 40.

Article 2.

Approval of Breath Test Devices.

~~6 VAC 20-190-80.~~ 6 VAC 40-20-80. Approval.

All breath tests as prescribed in §§ 18.2-268.9, 29.1-738.2 and 46.2-341.26:9 of the Code of Virginia shall be performed on a breath test device approved by the ~~division~~ department. Those breath test devices listed in the "Conforming Products List of Evidential Breath Measurement Devices" as established by the National Highway Traffic Safety Administration ("NHTSA"), United States Department of Transportation, or in such other list as may be established by

NHTSA evidencing that such device meets criteria, standards or specifications promulgated by it, as published from time to time in the Federal Register, may be approved by the ~~division~~ department as a breath test device. In approving such devices, the ~~division~~ department will consider factors including, but not limited to, costs, maintenance, necessity of instruction and/or training by the ~~division~~ department, ease of operation, availability of parts and service facilities, reliability, maintenance instruction and the historical performance record of the device.

~~6 VAC 20-190-90.~~ 6 VAC 40-20-90. Publishing list of devices.

The ~~division~~ department shall periodically publish in the Virginia Register of Regulations a list of any device(s) approved for use as breath test device(s). Such list shall be published forthwith after any addition or deletion of any device(s) to or from the ~~division's~~ department's approved list. The ~~division~~ department may, in addition, provide copies of its approved list to any agency subject to this chapter.

~~6 VAC 20-190-100.~~ 6 VAC 40-20-100. Publishing list of supplies.

The ~~division~~ department shall periodically publish in the Virginia Register of Regulations a list of any supplies and accessories approved for use with breath test devices that may be purchased by an agency. Such list shall be published forthwith after any addition or deletion of any supplies or accessories to or from the ~~division's~~ department's approved list. The ~~division~~ department may, in addition, provide copies of its approved list to any agency subject to this chapter.

Article 3.

Methods of Conducting Breath Tests.

~~6 VAC 20-190-110.~~ 6 VAC 40-20-110. Methods and procedures.

The ~~division~~ department shall approve such methods of performing breath tests as are demonstrated to the satisfaction of the ~~division~~ department to produce accurate and reliable determinations in a reasonable, convenient and effective manner. The ~~division~~ department approves the following breath test methods and procedures:

1. All breath test devices shall be operated in accordance with those sections of the instructional manual published by the ~~division~~ department that are applicable to the particular breath test device. Licensees shall follow any additional instructions or modifications of instructions published by the ~~division~~ department in supplements to the foregoing instructional manual.
2. The person to be tested shall be observed for at least 20 minutes prior to collection of the breath specimen, during which period the person must not have ingested fluids, regurgitated, vomited, eaten, or smoked. Should any of these actions occur, an additional 20-minute observation period must be performed.
3. The licensee shall verify that the breath test device is properly calibrated and in proper working order by conducting a room air blank analysis prior to analysis of the

breath of the person and by conducting a validation test with a control sample as part of the test protocol.

4. The licensee must use only supplies and accessories issued by or approved by the ~~division~~ department in conducting breath tests on approved breath test devices.

Article 4.

Licensing Procedures.

~~6 VAC 20-190-120.~~ **6 VAC 40-20-120. Licensing procedures.**

A. The ~~division~~ department shall issue, renew, terminate and revoke licenses for individuals to perform breath alcohol tests on the basis of standards set forth in this chapter.

B. Application for an initial license to perform breath tests shall be made in writing to the ~~division~~ department. The applicant shall have the endorsement of the appropriate supervisory law-enforcement officer or designated representative unless an exception is granted by the ~~division~~ department.

C. The initial licenses shall be granted to individuals who demonstrate the ability to perform breath tests accurately and reliably in accordance with the methods approved by the ~~division~~ department.

D. Only individuals successfully completing a basic course of instruction shall be deemed to have demonstrated competence to qualify for the issuance of an initial license. Further instruction may be required by the ~~division~~ department to qualify a licensee to perform tests using additional breath test devices.

E. Licenses shall be limited in scope to those breath test devices on which the individual applying for an initial or renewal license has demonstrated competence.

F. Licenses shall state the date upon which they are to expire, which date shall, in no event, be later than 24 months after the date of issuance. Licenses shall be subject to renewal at expiration or at such time prior to expiration as is convenient for the ~~division~~ department on demonstration by the licensee of continuing competency to perform accurate and reliable breath tests. The ~~division~~ department may at any time examine licensees to determine such continuing competency. Licenses may be terminated or revoked by the ~~division~~ department at any time upon its finding that the licensee no longer meets the qualifications necessary for the issuance of a license.

G. Any individual whose license has expired may renew his license within one year after its expiration date by successfully completing a recertification class and by demonstrating his competence in the performance of breath tests. Any individual (i) who fails the recertification class or (ii) whose license has expired and who does not renew his license within one year after its expiration date may renew his license by again attending and successfully completing the basic course of instruction referred to in subsection D of this section and demonstrating competence in the performance of breath tests as otherwise required.

H. The failure of a licensee to comply with this chapter may be grounds for revocation of such individual's license.

~~6 VAC 20-190-130.~~ **6 VAC 40-20-130. Certificates.**

The ~~division~~ department shall issue, terminate and revoke instructor certificates for individuals to teach breath alcohol testing on the basis of the following standards:

1. The instructor certificate shall be granted only to individuals who (i) demonstrate the ability to teach the breath test method or methods approved by the ~~division~~ department, (ii) possess a valid breath test license, and (iii) satisfactorily complete a course for Breath Alcohol Instructors. The ~~division~~ department may issue instructor certificates to persons who have acquired the necessary ability by past experience or formal education.

2. Instructor certificates shall be limited in scope to the methods or devices for which the individual has demonstrated competence.

3. The ~~division~~ department may at any time examine instructors to determine continuing ability.

4. Instructor certificates shall be terminated or revoked by the ~~division~~ department upon its finding that the instructor no longer meets the necessary qualifications.

~~6 VAC 20-190-140.~~ **6 VAC 40-20-140. Revocation.**

Any revocation of a license or instructor certificate shall be by notice sent by registered or certified mail from the ~~division~~ department to the licensee or instructor.

Article 5.

Forms and Records.

~~6 VAC 20-190-150.~~ **6 VAC 40-20-150. Records.**

The ~~division~~ department shall download by modem, at least once each month, data from each breath test device assigned to an agency. The ~~division~~ department shall keep this data on file for at least three years.

~~6 VAC 20-190-160.~~ **6 VAC 40-20-160. Checklist.**

A preventive maintenance checklist provided by the ~~division~~ department shall be completed at least once each month for each breath test device assigned to an agency. A copy of this preventive maintenance checklist shall be submitted to the ~~division~~ department to be kept on file for at least three years.

PART III.

PRELIMINARY BREATH TESTS UNDER §§ 18.2-267, 29.1-738.1 AND 46.2-341.25 OF THE CODE OF VIRGINIA.

~~6 VAC 20-190-170.~~ **6 VAC 40-20-170. Preliminary breath test device.**

All preliminary breath tests shall be performed on a preliminary breath test device approved by the ~~division~~ department. Such devices shall offer convenience and efficiency in operation as determined by the ~~division~~ department and shall also satisfy the requirements of either subdivision 1 or 2 of this section.

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1. For instruments having a numeric readout, the device shall have a systematic error not exceeding $\pm 10\%$.
2. For instruments having a pass/fail, colored light readout, the device shall satisfy the following specifications:
 - a. When a sample of breath is properly taken from a person with an actual blood alcohol concentration of 0.05% or less by weight by volume or 0.05 grams of alcohol per 210 liters of breath, the device shall not indicate a positive result.
 - b. When a sample of breath is properly taken from a person with an actual blood alcohol concentration of 0.08% or more by weight by volume or 0.08 grams of alcohol per 210 liters of breath, the device shall not indicate a negative result.

~~6 VAC 20-190-180.~~ 6 VAC 40-20-180. List of preliminary devices.

The ~~division~~ *department* shall periodically publish in the Virginia Register of Regulations a list of devices approved for use as preliminary breath test devices. Such list shall be published forthwith after any addition or deletion of any device(s) to or from the ~~division's~~ *department's* approval list.

~~6 VAC 20-190-190.~~ 6 VAC 40-20-190. Operational procedures.

All preliminary breath tests shall be conducted substantially in accordance with the operational procedures set forth in the instruction manual of the manufacturer of the instrument in use except as may be modified by the ~~division~~ *department*.

~~6 VAC 20-190-200.~~ 6 VAC 40-20-200. Preventive maintenance.

It shall be the responsibility of each agency using preliminary breath test devices to provide preventive maintenance and repairs according to the manufacturer's instructions or procedures except as may be modified by the ~~division~~ *department*.

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